UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK JOHN ELLIOTT, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C09-1633-JCC-MAT REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Mark John Elliott proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1958.[1] He has a high school education and two years of college. He previously worked as a stock clerk. (AR 20, 41.)

Plaintiff filed an application for DIB and SSI benefits on August 26, 2008, alleging disability beginning January 1, 2003, later amended to May 2, 2007. (AR 32, 101.) He is insured for DIB through March 31, 2011. (AR 11.) Plaintiff's application was denied at the initial level and on reconsideration, and he timely requested a hearing.

On May 20, 2009, ALJ Verrell Dethloff held a hearing, taking testimony from plaintiff. (AR 23-40.) On July 28, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR 11-22.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on October 30, 2009 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity (SGA) since the alleged onset date. Although

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

plaintiff had worked after that date, the ALJ found that the work did not rise to the level of SGA. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's affective disorder and personality disorder severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria of a listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform a full range of work at all exertional levels with non-exertional limitations of performing simple, repetitive tasks and an inability to interact closely with co-workers and the public. With that assessment, the ALJ found plaintiff unable to perform his past relevant work as a stock clerk. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ found that the Medical-Vocational Guidelines compelled a finding of "not disabled," considering the plaintiff's age, education, work experience, and RFC.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which

supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erroneously evaluated the opinions of examining doctors Widlan and Hellekson,[2] as well as failed to completely explain the weight given to opinions of the non-examining psychological consultants. Plaintiff takes issue with the process whereby the ALJ reached the RFC finding, and argues that the presence of significant non-exertional impairments precluded the ALJ's reliance on the Medical-Vocational Guidelines at step five. He requests remand for an award of benefits or, alternatively, for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence, is free of legal error, and should be affirmed.

Medical Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

2 Both parties, and the ALJ, consistently misspell Dr. Hellekson's name. (*See, e.g.*, Dkt. 17 at 1, Dkt. 23 at 4.)

"The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Id.* at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) and *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984)). However, "the report of a nonexamining, nontreating physician need not be discounted when it 'is not contradicted by *all other evidence* in the record.'" *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting *Magallanes*, 881 F.2d at 752 (emphasis in original)).

The ALJ may reject physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ "must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

"Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See, e.g.*, *Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations is sufficient to meet or equal [a listing.]"); *Smolen v.*

Chater, 80 F.3d 1273, 1292 (9th Cir. 1996) (ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony legally insufficient; finding record fully developed and disability finding clearly required).

However, courts retain flexibility in applying this "'crediting as true' theory." *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true). As stated by one district court: "In some cases, automatic reversal would bestow a benefits windfall upon an undeserving, able claimant." *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

Plaintiff assigns error to the ALJ's assessment of the opinions of examining psychologist David Widlan, Ph.D., and examining psychiatrist Carla Hellekson, M.D. Plaintiff argues that, given the lack of substantial evidence to support the ALJ's rejection of the opinions, they must be credited as true. Plaintiff contends that the ALJ failed to explain why "significant weight" was given to some of the opinions of non-examining psychological consultants, while other limitations opined by those consultants were not addressed. (AR 19.)

The ALJ assessed the medical opinion evidence as follows:

> As for the opinion evidence, the undersigned assigns significant weight to the opinions of the State agency psychological consultants who opined that the [plaintiff] retained the ability to perform work involving 1-2 step tasks and multi-step tasks (*See, e.g.,* Ex. 4F [AR 212-216]) but that the [plaintiff] was limited from interactions with the public.

> I assign partial weight to the opinion of Dr. Widlan to the extent consistent with the residual functioning capacity as stated above. ([AR 212-216.]) Dr. Widlan opined that the [plaintiff] was capable of performing simple repetitive tasks, which I find persuasive. However, Dr. Widlan also opined that the [plaintiff's] prognosis for maintaining employment was poor without considerable treatment and that he appeared to have clear deficits with adaptation in terms of ability to maintain employment. I assign this particular opinion little weight because the record shows that the [plaintiff] has failed to seek the typical treatment for his allegedly disabling symptoms as discussed earlier, and that there is insufficient evidence to support Dr. Widlan's opinions regarding the [plaintiff's] ability to adapt and maintain employment.
>
> I assign no weight to the opinion of Carla Heliekson [sic], M.D., who opined that the [plaintiff] was severely limited in ability to perform routine tasks, exercise judgment, make decisions, respond appropriately to and tolerate pressures and expectations in the normal work setting, and control physical or motor movements and maintain appropriate behavior. [AR 206-11, 393-96]. This opinion appears to be primarily based on the [plaintiff's] subjective complaints—particularly the [plaintiff's] allegation of previously unsuccessfully attempting over 300 jobs, which appears to be an exaggeration as mentioned earlier—rather than any supporting substantive objective medical evidence, which the record significantly lacks as also discussed above. Further, any social limitations were adequately addressed in the residual functioning capacity by restricting the [plaintiff] from regular interaction with co-workers and the public.

(AR 19.)

A. Non-Examining Psychological Consultants

As noted above, the ALJ assigned significant weight to the opinions "of the State agency psychological consultants" as to plaintiff's ability to perform work involving one-to-two step and multi-step tasks, and a limitation in plaintiff's ability to interact with the public. The consultants are not identified by name, but presumably are Alex Fisher, Ph.D. and Kent Reade, Ph.D. (AR 251-70.)[3]

3 The ALJ's reference to Administrative Exhibit 4F (AR 212-216) appears to be a scrivener's error, as this exhibit is the report of Dr. Widlan, an examining psychologist.

The Commissioner does not address this issue and, as plaintiff notes, the ALJ did not specifically explain the basis for giving these particular opinions significant weight. Plaintiff also notes that the ALJ did not address other opinions articulated by these consultants in their reports. (AR 254 ("While the [plaintiff] would at times have challenges in completing a normal work week, he would be able to successfully achieve the task the majority of the time. …The [plaintiff's] low stress tolerance would result [in] some difficulty adapting to change, yet he would be able to adapt to changes in the work environment.")) The omitted opinions are generally corroborative of plaintiff's ability to work, although Dr. Fisher's opinion that plaintiff would be able to successfully work "the majority of the time" is imprecise. (AR 254.)

Although an ALJ need not discuss all evidence, he must explain why "significant probative evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1391, 1394-95 (9th Cir. 1984) (citing *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981).) Because the ALJ assigned "significant weight" to this opinion evidence, it cannot be said that the failure to provide an adequate basis to review the ALJ's consideration of the evidence is harmless. On remand, the ALJ should more fully explain the reasons for accepting or rejecting the evidence from the non-examining psychological consultants.

B. David Widlan, Ph.D.

The ALJ adopted Dr. Widlan's opinion that plaintiff was capable of performing simple, repetitive tasks, but did not accept the psychologist's opinion that plaintiff had a poor prognosis for employment without considerable treatment, or the opinion that plaintiff had clear deficits with adaptation in terms of his ability to maintain employment. Plaintiff argues that the ALJ's evaluation of Dr. Widlan is not supported by substantial evidence. Specifically, plaintiff

argues that a lack of medical treatment for depression should not negate the existence of a mental impairment or resulting limitations. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) ("[I]t is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.") (citing *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989)). Plaintiff also disputes the ALJ's finding of insufficient evidence of problems with his ability to maintain employment, citing a history of brief periods of employment with at least ninety employers.

In response, the Commissioner notes that Dr. Widlan's opinion was contradicted by Dr. Fisher's opinions that plaintiff would be able to complete a normal work week "the majority of the time" and to adapt to changes in the work environment. (AR 254.) The Commissioner asserts that the ALJ properly rejected Dr. Widlan's opinion because it was based on plaintiff's failure to obtain mental health treatment and his unreliable subjective allegations.

As stated above, however, Dr. Fisher's opinion that plaintiff could work "the majority of the time" (AR 254) is vague. Further, reviewing courts view with skepticism the drawing of a negative conclusion from the failure of an individual with a mental impairment to seek psychiatric treatment. *Nguyen*, 100 F.3d at 1465. Although the Commissioner cites evidence from the record that would contradict Dr. Widlan's opinion regarding plaintiff's ability to adapt and maintain employment (Dkt. 23 at 6 (citing lack of history of altercations in the workplace, possible secondary gain, or inconsistency with other evidence)), neither these reasons, nor the opinion of Dr. Fisher, were cited by the ALJ as a basis for the finding. The Court reviews the ALJ's decision "based on the reasoning and factual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray v.*

Comm'r of SSA, 554 F.3d 1219, 1225 (9th Cir. 2009) (citing, *inter alia*, *Snell v. Apfel*, 177 F.3d 128, 134 (2d Cir. 1999) ("The requirement of reason-giving exists, in part, to let claimants understand the disposition of their cases…")). Further, as plaintiff notes, his work history of brief employment with at least ninety different employers, while short of plaintiff's estimate of 300 jobs (*see, e.g.*, AR 152), does not negate Dr. Widlan's opinion that plaintiff has "clear deficits with adaptation in terms of his ability to maintain employment". (AR 215.) In sum, substantial evidence does not support the ALJ's evaluation of Dr. Widlan's opinion.

C. Carla Hellekson, M.D.

Plaintiff also argues that the ALJ's reasons for giving "no weight" to the opinion of Dr. Hellekson lack substantial evidence support. Specifically, plaintiff disputes the ALJ's finding that Dr. Hellekson's opinion was primarily based on his subjective complaints, noting that the doctor evaluated the results of standard cognitive tests, as well as clinical signs. In response, the Commissioner argues that Dr. Hellekson's opinion is contradicted by that of Dr. Fisher (AR 254 ("he would be able to successfully achieve the task the majority of the time…would be able to adapt to changes in the work environment.")), and, therefore, may be disregarded if largely premised on the plaintiff's incredible complaints. *Morgan v. Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999) ("A physician's opinion of disability 'premised to a large extent upon the claimant's own accounts of his symptoms and limitations' may be disregarded where those complaints have been 'properly discounted.'") (quoting *Fair v Bowen*, 885 F.2d 597, 605 (9th Cir. 1989) (citing *Brawner v. Sec'y* 839 F.2d 432, 433-34 (9th Cir. 1988)). While agreeing that Dr. Hellekson did not rely exclusively on plaintiff's subjective complaints, the Commissioner asserts that she did so to a significant extent. Since the ALJ appropriately found those

complaints not credible, the Commissioner argues, the ALJ properly rejected Dr. Hellekson's opinions.

Plaintiff's argument, however, is persuasive. The ALJ downplayed the existence of any objective support for Dr. Hellekson's opinion. (AR 19 ("This opinion appears to be primarily based on the [plaintiff's] subjective complaints…rather than any supporting substantive objective medical evidence, which the record significantly lacks as also discussed above.")) Rather, the ALJ indicated he was giving no weight to the opinion because Dr. Hellekson relied "particularly" on plaintiff's report of unsuccessfully attempting over 300 jobs, which the ALJ found to be an exaggeration.

The Court is persuaded that the ALJ did not provide legally sufficient reasons for rejecting Dr. Hellekson's opinions. Although plaintiff's tendency to exaggerate could properly be considered in evaluating plaintiff's credibility in general, the fact remains that plaintiff's work history includes numerous unsuccessful work attempts. Furthermore, Dr. Hellekson cited other reasons for her opinions that plaintiff had severe limitations and was seriously disturbed, such as plaintiff's difficulty on the standard cognitive exam and a pattern of getting a job and either failing to go to work the first day or to pick up his paycheck. (AR 208-09.)

At the same time, plaintiff fails to establish that the record supports crediting examining physicians Dr. Widlan's or Dr. Hellekson's opinions as true. That is, plaintiff does not establish that, by crediting the opinions to his difficulties with or interferences in relation to work functions as true, the evidence supports a finding of disability. *See*, *e.g.*, *Schneider*, 223 F.3d at 976; *Smolen*, 80 F.3d at 1292. Instead, the ALJ should be required to reconsider and

further explain the weight given to both Dr. Widlan's and Dr. Hellekson's opinions on remand, as well as to the non-examining psychological consultants.

Residual Functional Capacity

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess his work-related abilities on a function-by-function basis, including a required narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; Social Security Ruling (SSR) 96-8p. RFC is the most a claimant can do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff's impairments, including those that are not severe, in determining his RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

Plaintiff avers several errors in the ALJ's determination of his RFC. First, plaintiff argues that the ALJ's RFC determination failed to consider all of the medical opinions as required by SSR 96-6p and 96-8p. *See* SSR 96-6p *4 ("Although the administrative law judge and the Appeals Council are responsible for assessing an individual's RFC at their respective levels of administrative review, the administrative law judge or Appeals Council must consider and evaluate any assessment of the individual's RFC by a State agency medical or psychological consultant and by other program physicians or psychologists."); SSR 96-8p *7 ("If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted.") Next, Plaintiff argues that the ALJ failed to support the finding that plaintiff cannot "interact closely with co-workers and the public" with citations to the record. (AR 16.) Finally, plaintiff argues that the ALJ erred by failing to include an RFC limitation relating to his moderate difficulties in maintaining concentration, persistence, or pace.

A. Consideration of Medical Opinions

Plaintiff lists a number of non-examining physicians whose opinions he contends the ALJ did not mention or discuss. (Dkt. 17 at 14.) As a result of this omission, plaintiff argues, the ALJ violated SSR 96-8p. In response, the Commissioner contends that the opinions of these medical personnel were either specifically discussed by the ALJ, were consistent with opinions that were otherwise addressed by the ALJ, or did not opine any functional limitations. Therefore, the Commissioner argues, plaintiff does not identify any functional limitation addressed by these physicians that the ALJ failed to include in the RFC assessment.

The Court agrees that plaintiff's assignment of error falls short. Plaintiff appears to contend that the ALJ's failure to mention certain non-examining physicians is *per se* reversible error, failing to cite any specific opinion that he contends was overlooked.[4] *See generally Vincent*, 739 F.2d at 1394-95 (an ALJ is not required to discuss all the evidence presented, so long as he explains why "significant probative evidence has been rejected.") (citing *Cotter*, 642 F.2d at 706). Thus, plaintiff fails to demonstrate how the failure by the ALJ to address any particular medical opinion would be harmful error in the assessment of his RFC. *See generally Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless error in Social Security context where a "mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion.") However, as noted above, the Court agrees that the ALJ should more fully explain the consideration given to the

4 In his Reply Brief, plaintiff's argument became somewhat more specific, but not sufficient to cure the defect. (Dkt. 24 at 5-6.) *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("arguments not raised by a party in an opening brief are waived.") (citing *Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)).

non-examining psychological consultants whose opinions were referenced in the ALJ's decision.

B. Limitation on Close Interaction with Co-Workers and the Public

Plaintiff asserts that, while the ALJ found he cannot "interact closely with co-workers and the public," he failed to support the finding with a citation to record evidence. Plaintiff further argues that the ALJ erred in failing to define "closely interact." The Commissioner responds that the ALJ's finding was based on a reasonable interpretation of the report of Dr. Fisher, who noted the lack of support for plaintiff's allegation that he involuntarily yells Spanish epithets at random times, as well as the lack of corroboration for plaintiff's testimony that he will physically harm his coworkers if he works. The Commissioner cited plaintiff's comments to medical providers that he feels useless unless he is working and can "always put a good face on for work". (AR 246.) The Commissioner disavows the insufficiency of the ALJ's limitation on interaction with coworkers and the public, arguing that a reading of the regulation does not support plaintiff's argument that any greater specificity is required. 20 C.F.R. §§ 404.1545(c), 416.945(c) ("When we assess your mental abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, co-workers, and work pressures in a work setting, may reduce your ability to do past work and other work.")

The Court is not convinced that the ALJ was required to provide any greater specificity than the limitation set forth in the decision. (AR 16.) The ALJ found that plaintiff had

moderate difficulties in social functioning, noting his minimal contact with family and friends and Dr. Widlan's opinion that plaintiff had difficulties with social reasoning. (AR 15.) However, the ALJ found plaintiff's allegations of uncontrollable anger and increasing symptoms not fully credible, noting the lack of evidence of any physical altercations or any reports of hostile behavior, plaintiff's denial of a history of psychiatric problems, evidence of "secondary gain for housing", and a failure to report problems in functioning or anger issues to examining doctors. (AR 18.) Further, as the Commissioner points out, the ALJ cited the inconsistency between plaintiff's report to Dr. Widlan of randomly uttering Spanish epithets, as compared to plaintiff's report that he was able to "always put a good face on for work". (AR 19.) Noting that "aspects of personality disorder indicating that the [plaintiff] might have conflicts with his superiors does not make the [plaintiff] disabled" (AR 18 at n. 2, case citation omitted), the ALJ concluded that "any social limitations were adequately addressed in the residual functional capacity by restricting the [plaintiff] from regular interaction with co-workers and the public." (AR 19.) The ALJ provided legally sufficient reasons for including this limitation in the RFC assessment.

C. Limitations in Maintaining Concentration, Persistence, or Pace

Plaintiff argues that the ALJ found that he has moderate difficulties in maintaining concentration, persistence, or pace, but failed to include this limitation in the RFC assessment. Plaintiff contends that the limitation to simple, repetitive tasks is insufficient to address such a limitation. In response, the Commissioner argues that the ALJ's RFC assessment is supported by substantial evidence, in that it properly relied on the opinion of Dr. Fisher that these difficulties would not preclude plaintiff from performing work involving one-to-two step and

multi-step tasks, and completing a normal work week the majority of the time.

The Court does not find unreasonable the ALJ's accommodation of plaintiff's moderate difficulties with concentration, persistence, or pace by restricting plaintiff to simple, repetitive tasks. Moderate, and even marked, limitations in the ability to maintain attention, concentration, persistence, and pace are compatible with the ability to perform unskilled jobs involving simple tasks. *See Thomas*, 278 F.3d at 958 (holding that a claimant with "a marked limitation in her ability to maintain concentration over extended periods" would be capable of performing unskilled jobs involving simple tasks) and *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) (ALJ's finding that claimant was restricted to "simple tasks" did not constitute a rejection of physician's opinion that claimant was moderately limited in the ability to maintain a consistent pace). The ALJ noted Dr. Widlan's report that plaintiff was able to exhibit "adequate" concentration and maintain focus and adequate pace while completing a simple three-step task. (AR 15.) However, the ALJ also relied on the opinion of Dr. Fisher in adopting this restriction. As noted above, this Court finds vague Dr. Fisher's opinion that plaintiff could complete a normal work week "the majority of the time". Further, this Court has found that remand is required to further consider the opinions of Dr. Widlan. On remand, the ALJ should re-address the RFC finding, if implicated by the reconsideration of these medical opinions.

Medical-Vocational Guidelines

An ALJ may rely on the Medical-Vocational Guidelines ("guidelines" or "grids") to meet the Commissioner's burden at step five, but "'only when the grids accurately and completely describe the claimant's abilities and limitations.'" *Burkhart v. Bowen*, 856 F.2d

1335, 1340 (9th Cir. 1988) (quoting *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)). "When a claimant's non-exertional limitations are 'sufficiently severe' so as to significantly limit the range of work permitted by the claimant's exertional limitations, the grids are inapplicable[]" and the testimony of a VE is required. *Id*. (quoting *Desrosiers v. Sec'y.*, 846 F.2d 573, 577 (9th Cir. 1988)). *Accord Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007) ("[A]n ALJ is required to seek the assistance of a vocational expert when the non-exertional limitations are at a sufficient level of severity such as to make the grids inapplicable to the particular case.")

"[T]he fact that a non-exertional limitation is alleged does not automatically preclude application of the grids. The ALJ should first determine if a claimant's non-exertional limitations significantly limit the range of work permitted by his exertional limitations." *Desrosiers*, 846 F.2d at 577 ("It is not necessary to permit a claimant to circumvent the guidelines simply by alleging the existence of a non-exertional impairment, such as pain, validated by a doctor's opinion that such impairment exists. To do so frustrates the purpose of the guidelines.") *Accord Razey v. Heckler*, 785 F.2d 1426, 1430 (9th Cir. 1986) ("The regulations . . . explicitly provide for the evaluation of claimants asserting both exertional and non-exertional limitations. [20 C.F.R. Pt. 404, Subpt. P, App. 2] at § 200.00(e)."), *modified at* 794 F.2d 1348 (1986). "Non-exertional impairments may or may not significantly narrow the range of work a person can do." SSR 83-14. For example, in *Hoopai*, 499 F.3d at 1076-77, the Ninth Circuit Court of Appeals found that substantial evidence supported the ALJ's conclusion that a claimant's depression, with evidence of various associated moderate limitations, was not a sufficiently severe non-exertional limitation prohibiting reliance on the

grids without the assistance of a vocational expert (VE). In contrast, in *Tackett v. Apfel*, 180 F.3d 1094, 1103-04 (9th Cir. 1999), the Ninth Circuit found that a claimant's "need to shift, stand up, or walk around every 30 minutes [was] a significant non-exertional limitation not contemplated by the grids[]" and, therefore, that "mechanical application of the grids was inappropriate."

In this case, after determining plaintiff's RFC, the ALJ found plaintiff could not perform his past relevant work as a stock clerk. (AR 20.) The ALJ proceeded with the sequential analysis and, utilizing the grids as a framework, found plaintiff capable of performing other work at step five. Plaintiff argues that the presence of significant nonexertional impairments required the ALJ to utilize a VE rather than using the grids as a framework for his step five decision.

The Commissioner avers that the ALJ properly found that the grids could be used as a framework for determining plaintiff was not disabled at step five. The Commissioner contends that plaintiff's non-exertional limitation to work not involving close interaction with coworkers and supervisors has no more than a slight limiting effect on the occupational base of unskilled work at all exertional levels.

As noted by the Commissioner, the presence of non-exertional limitations does not automatically prohibit reliance on the grids without the assistance of a VE, so long as the ALJ makes a determination that the limitations do not significantly erode the occupational base. *Desrosiers*, 846 F.2d at 577. However, in this case the ALJ's finding in that regard was cursory:

> The [plaintiff's] ability to perform work at all exertional levels has been compromised by non-exertional limitations. However, the [plaintiff's] limitation to performing simple repetitive tasks and restrictions in interacting with coworkers and public have only a slight effect on the occupational base of unskilled work at all exertional levels under Social Security Ruling 85-15.

(AR 21.)

The ALJ did not explain the basis for this conclusion, citing cases that addressed one, but not both, of the restrictions imposed in this case. *See, e.g., Hoopai*, 499 F.3d at 1076 (involving moderate limitations in the ability to maintain attention, concentration, and pace and to perform within a schedule, maintain regular attendance, be punctual and complete a normal workday without interruption from psychologically-based); *Zalewski v. Heckler*, 760 F.2d 160, 165, n. 5 (9th Cir. 1985) (involving a limitation to minimal interaction with others); *Ortiz v. Apfel*, 55 F. Supp. 96, 101-02 (D.P.R. 1999) (involving a limitation to simple, routine, repetitive tasks). On remand, the ALJ should either explain the basis for the conclusion that the listed restrictions do not significantly erode the occupational base of unskilled work, or utilize the services of a VE to complete the step five analysis.

CONCLUSION

For the reasons set forth above, this matter should be remanded for further administrative findings as set forth in this Report and Recommendation .

DATED this 22nd day of July, 2010.

Mary Alice Theiler
United States Magistrate Judge